IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY,

Petitioners,

v.

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF VIETNAM, AND THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota are contained in the Appendices to the Petition.

JURISDICTION

The jurisdictional requisites are set forth adequately in the Petition.

QUESTION PRESENTED

Whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970)?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clayton Act (Act of October 15, 1914, ch. 323, 38 Stat. 730, as amended) are set forth in the Petition, pp. 2-3.

STATEMENT OF THE CASE

The chronology of events contained in petitioners' statement of the case is essentially correct. Certain procedural background material underlying petitioners' belated resort to interlocutory appellate review was omitted.

The question of a foreign government's standing to maintain suit first was raised in the Consolidated Broad Spectrum Antibiotics Actions in 1969, when the State of Kuwait filed a damage action in the United States District Court for the Southern District of New York. In 1970, the Republic of Vietnam[1] filed a similar suit, and in 1971 petitioners moved to dismiss the *Kuwait* action on the ground that a foreign government is not a "person" within the meaning of Section 4 of the Clayton Act. Following briefing and argument, in which the United States participated as *amicus curiae* in support of the foreign governments' position, the district court entered an order denying the motions to dismiss. *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971). That order was certified pursuant to 28 U.S.C. §1292(b) (1970) to the United States Court of Appeals for the Second Circuit which accepted petitioners' appeal.[2] *Appeal Docketed*, No. 71-1754 (2d Cir. 1971).

[1] The Vietnam action has been dismissed by the district court. *The Republic of Vietnam v. Pfizer, et al.*, No. 4-71 Civ. 402 (D. Minn., Dec. 2, 1976) (order dismissing action). *Appeal Noticed*, Dec. 23, 1976 (8th Cir.).

Prior to the completion of the briefing schedule, however, petitioners requested the Second Circuit to dismiss their appeal, apparently as a result of an agreement with the plaintiff by which Kuwait dismissed its action on a non-prejudicial basis. At the time petitioners moved to dismiss the appeal, the "person" issue was not mooted because the District Court's *Kuwait* decision specifically had made that ruling applicable to Vietnam. *In Re Antibiotic Antitrust Actions, supra*, 333 F. Supp. at 315, N.1.

In April, 1972, the Republic of the Philippines brought suit and petitioners again raised the affirmative defense that a foreign government lacked standing to maintain suit. The Philippines filed a motion to strike the affirmative defense and on January 16, 1974 the District Court for Minnesota again ruled that foreign governments are "persons" with standing to sue. Misc. Order No. 74-31, Petition App. C. Defendants declined the invitation of the Philippines to seek immediate certification pursuant to 28 U.S.C. §1292(b) notwithstanding the District Court's announced

[2] In 1970, the non-settling broad spectrum antibiotics actions were consolidated pursuant to 28 U.S.C. §1407 (1970) for coordinated pretrial proceedings in the Southern District of New York. *In re Antibiotic Drugs*, 320 F. Supp. 586 (Jud. Pan. Mult. Lit. 1970). These cases subsequently were transferred to the District of Minnesota pursuant to 28 U.S.C. §1404(a) (1970) and the United States Court of Appeals for the Eighth Circuit assumed jurisdiction of interlocutory appeals from the District Court. See *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

willingness to certify the issue upon petitioners' request. Transcript of Pretrial Conference, November 1, 1972 at 80-82, Appendix A. Petitioners resisted the opportunity to have the issue certified until June 1974.[3]

REASONS FOR DENYING THE WRIT

I.

THE ISSUE RAISED BY PETITIONERS WAS DECIDED CORRECTLY BY THE CIRCUIT COURT OF APPEALS. IT RAISES NO CONSTITUTIONAL QUESTION NOR DOES IT INVOLVE ANY CONFLICT BETWEEN CIRCUITS. THE ISSUE DOES NOT MERIT IMMEDIATE CONSIDERATION BY THIS COURT.

Petitioners assert that these actions, involving a question of statutory interpretation, pose an important and heretofore undecided question of federal law which this Court must settle without delay. There is nothing to suggest that immediate review of the Eighth Circuit's decision is necessary or appropriate or that that decision was incorrect. The Eighth Circuit opinion was consistent with the prior precedents of this Court and accurately reflected the intent of Congress in enacting Section 4 of the Clayton Act.

[3] The District Court then declined to certify the issue, and petitioners sought to obtain a writ of mandamus in the United States Court of Appeals for the Eighth Circuit directing certification. The Eighth Circuit denied the petition. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). When the Government of India filed suit on October 11, 1974, the District Court agreed to certify the issue not only as to India but as to other governments which would be affected by the outcome. These included Iran, the Philippines and the Republic of Vietnam. It is this interlocutory appeal which is the subject of the instant petition.

A. The Question of Foreign Government Standing Under Section 4 of the Clayton Act Has Been Reviewed Comprehensively by Two Lower Courts Which Correctly Decided the Issue.

The question of a foreign government's standing to maintain an action for damages in its proprietary capacity under Section 4 of the Clayton Act has been the subject of careful and lengthy consideration by both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota. The District Court found that these foreign sovereigns were "persons" within the meaning of Section 4; the Court of Appeals panel unanimously affirmed that judgment; and finally the Eighth Circuit sitting *en banc* endorsed the decision of the original panel. There has been no conflict in the decisions of the lower courts in these actions, nor has there been a conflict with the decision of any other federal court. Moreover, the Executive Branch throughout this litigation has supported the standing of foreign governments to seek redress for antitrust violations[4]; the Department of Justice appeared *amicus curiae* in both the District Court and, after due consultation with the Department of State, in the Court of Appeals. In short, petitioners ask this Court to "settle" without delay a question as to which there has been no disagreement in the Judicial or Executive Branches of the government.

[4] In its consideration of government entities as "persons" within the meaning of the Clayton Act, the Court, in *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941), set forth a series of criteria to assist it in the evaluation of the Congressional intent. Among these considerations were the purpose, subject matter, context, legislative history and the "executive interpretation of the statute." Plainly, this important criterion has been satisfied. The assertion of the Attorney General that denial of remedy to foreign nations would undermine the fundamental purpose of the Clayton Act is entitled to great weight.

Petitioners cannot contend that the Court below failed to consider properly the controlling precedents of this Court or so departed from the accepted course of judicial proceedings as to compel the Court to exercise its "supervisory jurisdiction." Petition, p. 8; Sup. Ct. R. 19(1)(b). In reality, petitioners' only complaint is that they disagree with a result arrived at after much deliberation and careful thought.

B. Petitioners Are Incorrect in Their Assertion That Congress Did Not Intend to Include Foreign Governments Within the Meaning of "Person" for Purposes of Section 4.

Petitioners have asserted incorrectly, Petition, p. 8, that the Eighth Circuit made no finding of a Congressional intent to include foreign governments as persons. Not only was such finding made,[5] but it is supported by reference to the underlying purpose of the statute and by the repeated expression of interest by the Congress in protecting the foreign commerce of the United States including commerce with foreign nations.[6]

---

[5] The Eighth Circuit held:

> In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, *we conclude that Congress intended other bodies politic, such as a foreign government,* to enjoy the same right. There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper,* no other provisions of the Act support the contention that Congress intended to exclude foreign nations.

Petition App. B-7 (emphasis added).

[6] As noted by the Eighth Circuit (Petition App. B-7 N.7), Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies "in restraint of trade or commerce . . . with foreign *nations.*" Act of July 2, 1890, ch. 647, §1, 26 Stat. 209 (emphasis added).

(continued)

Petitioners' reference to the general interpretive statute of 1871, Act of February 25, 1871, ch. 71, §2, 16 Stat. 431, is a weak reed indeed from which to attempt to derive the requisite degree of importance to merit Supreme Court review. If petitioners were correct that the 1871 statute precludes a finding that states and foreign governments are excluded as persons unless they are specifically defined as such, this Court could not have reached its holding in *Georgia v. Evans,* 316 U.S. 159 (1942).

Some twenty years before the passage of the Sherman Act, this Court stated that a foreign sovereign suing in U.S. courts was to be accorded the same status as "any other foreign person."[7] This equation of the sovereign's status as an artificial person with that of a natural or other juristic person before courts of the United States was a concept well entrenched by the year 1890. In *Cotton v. United States,* 52 U.S. (11 How.) 229, 231 (1850), this Court had highlighted the unreasonable nature of denying to a sovereign as an artificial person the same relief available to other persons:

> Every sovereign state is of necessity a body politic, *or artificial person,* and as such capable of making contracts and holding property . . . It would present a strange anomaly, indeed, if, having the power to make

---

[6] (continued)

Similarly, Section 2 proscribes monopolizing and conspiring and attempting to monopolize commerce "with foreign *nations.*" *Id.* §2 (emphasis added). And Section 1 of the Clayton Act expressly refers three times to commerce "with foreign *nations*" in the definition of the term "commerce." Act of Oct. 15, 1914, ch. 323, §1, 38 Stat. 730 (emphasis added).

[7] In *The Sapphire,* 78 U.S. 164, 167 (1870), the Court simply summarized what long had been the rule:

> *A foreign sovereign, as well as any other foreign person,* who has a demand of a civil nature against any person here, may prosecute it in our courts. (emphasis added).

contracts and hold property as other persons, natural or artifical, they were not entitled to the same remedies for their protection. (emphasis added).

Between 1890 and 1914 when Congress enacted the Clayton Act, foreign governmental entities brought a number of antitrust-type unfair competition suits for damages and injunctive relief against U.S. companies in U.S. courts.[8] In *French Republic v. Saratoga Vichy Co., supra,* 191 U.S. at 438, this Court noted "(i)n such cases, . . . where the government is suing . . . for the prosecution of a private and proprietary instead of a public or governmental right . . ." it is in the same position as any other natural or juristic person with the same rights and subject to the same defenses.[9]

Thus, when Congress used the general word "person"[10] in the Clayton Act as adopted from the Sherman Act, it cannot be presumed to have been unaware that this Court consistently had recognized that foreign governmental entities were to be treated as any other juristic or natural person.[11] To conclude that Congress intended to except foreign

[8] *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 94 Fed. 500 (S.D.N.Y. 1899); *City of Carlsbad v. Kutnow*, 68 Fed. 794 (S.D.N.Y. 1895); *City of Carlsbad v. Schultz*, 78 Fed. 469 (S.D.N.Y. 1897).

[9] The rule has been summarized as follows: "A foreign sovereign plaintiff 'should so far as the thing can be done be put in the same position as a body corporate.'" *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-135 N.2 (1938).

[10] In *Nardone v. United States*, 302 U.S. 379, 384 (1937), the Court stated the general principle long-recognized in this country and in England that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong." *See also Stanley v. Schwalby*, 147 U.S. 508 (1893).

[11] By its very language, Section 4 is inclusive, not exclusive. Senator Edmonds, a principle draftsman of the bill which became the Sherman Act, summarized the framework of the bill as follows: "Then we say that *anybody*, without respect to the amount in controversy, may bring suit in the circuit court." 21 Cong. Rec. 3149 (1890) (emphasis added).

governments from that class of persons entitled to recover damages for antitrust violations would require clear evidence of such intent in view of the cases and the policy underlying the antitrust laws.

C. Petitioners' Own Conduct Refutes the Need for This Court to Examine the Question.

The asserted importance of this issue is negated by petitioners' own conduct in delaying its resolution. As noted, it was petitioners who frustrated interlocutory review of the "person" issue in the Second Circuit by dismissing their appeal in the *Kuwait* action.[12] It was petitioners who declined to seek immediate certification of the *Philippines* ruling despite plaintiff's agreement and the court's willingness to certify the issue. It was not until three years after the initial ruling of the District Court and six months after its affirmance of that ruling in the *Philippines* case that defendants suddenly were impressed with the issue's importance. Petitioners' newly discovered interest in the resolution of the issue appears to have coincided with a determination that the imminent tolling of the statute of limitations made it unlikely that additional foreign government actions would be filed.

D. Petitioners' Contention of Importance Is Not Supported by Their Speculative Assertions of Adverse Consequences That May Flow from the Decision.

Petitioners' remaining assertion of importance rests upon a prediction of disastrous consequences if the decision below is not reversed immediately. Petitioners' conjecture, unsupported by the record or any factual basis, that foreign governments may flock into court seeking to recover

[12] Since the district court ruling applied equally to Vietnam, petitioners' failure to prosecute the appeal to a decision is incompatible with their present position that this Court should hasten to decide the question. *See* p. 3, *supra.*

damages does not convert this issue into a question demanding immediate consideration by the Supreme Court.[13] It is instructive to note that during the three-year period between the initial decision of the District Court and the tolling of the statute of limitations in December 1974 only seven[14] foreign governments instigated recovery actions and of these seven only five remain as plaintiffs.[15] Further, neither petitioners nor respondents can cite any antitrust litigation initiated by a foreign sovereign in any action other than the broad spectrum antibiotics actions since the District Court's 1971 decision confirming the right of foreign governments to bring suits under Section 4 of the Clayton Act.

Petitioners' statement that " . . . it appears that the cases against petitioners are the first to be reported in which foreign countries have asserted a right to treble damages," (Petition, pp 17-18) is misleading. Petitioners have

[13] As to defendants' suggestion that American companies may be affected by the acts of foreign governments taken in a sovereign rather than a proprietary capacity, and that such unspecified actions somehow justify collusive activities including monopolizing and price fixing, the speculation simply is irrelevant to the question presented. Moreover, as defendants acknowledge (Petition, p. 11, No. 6), the Executive Department under the auspices of the Department of Justice has sanctioned and probably encouraged such joint action as may be necessary for the protection of legitimate business interests of American companies. Finally, we note that any action brought by a foreign government pursuant to the provisions of the Clayton Act would be conducted in United States courts and with reference to the laws of the United States and not those of any foreign country. No damages can be awarded except upon showing that foreign purchasers were injured in their business or property by acts in violation of the antitrust laws of the United States.

[14] The Philippines, India, Iran, West Germany, Colombia, Spain and South Korea.

[15] Spain and South Korea filed voluntary dismissals of their actions. As noted, *supra*, p. 2, the Republic of South Vietnam was involuntarily dismissed for lack of a viable government to pursue the action.

knowledge that in the electrical equipment cases the Republic of India in its own right, together with certain of its state-owned corporations[16] and several political subdivisions brought suit and participated in the settlement entered into by defendants in those actions.[17] Petitioners' representation to the Court is intended to suggest that importance of the standing question should be inferred because no foreign government heretofore has appeared as a damage claimant. In fact, the appearance of India as a plaintiff almost fifteen years ago illustrates the exaggerated nature of petitioners' "harmful consequences" argument.

The conclusion is inescapable that the passage of time since the District Court decision of 1971 has diminished the asserted importance of this question. Intervening years have witnessed no discernable increase in litigation by

[16] Any other interpretation than that foreign sovereigns purchasing in a proprietary capacity qualify as persons would create the anomalous situation in which foreign sovereigns are deprived of standing to sue while their wholly-owned government corporations possess such rights. The statute gives as an example of entities included as persons, "corporations . . . existing under or authorized by the laws of . . . any foreign country." 15 U.S.C. §12 (1970).

[17] *E.g., The Republic of India and the Mysore State Electricity Board v. General Electric*, Civ. Action No. 30965 (E.D. Pa. filed Feb. 5, 1962). Petitioners' misleading suggestion that these actions are the first in which foreign governments have brought claims is surprising since they had acknowledged the suit by India in an April 22, 1971 letter to the District Court. App. B. Included as Appendix C is an April 18, 1971 letter to Judge Lord (copy to petitioners) setting forth the conclusion of the Department of Justice that foreign government standing was affirmed in an unreported decision of the District Court for the Eastern District of Pennsylvania. The obligation not to rest upon disclaimers of knowledge of "reported" decisions is all the more apparent since it is petitioners who attempt to capitalize on the false concept of importance derived from the inaccurately asserted novelty of the issue.

foreign governments to recover overcharges based upon antitrust violations actionable under the Clayton Act. Neither has Congress expressed any interest in amending Section 4 to alter the result reached.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDICES

APPENDIX A

(Transcript of Pretrial Conference, November 1, 1972)

[80] * * * not to afford such a remedy. We also suggested that Cooper makes clear that's it not the function of the courts to indulge in the business of policymaking in the field of antitrust law.

Now, I would like, just to supplement our briefs on that matter, Your Honor, I would like to refer you to the Flood case, which I am sure you are familiar with, where the Supreme Court again refused to overrule the old Federal baseball case and pointed to the fact that Congress should not act, and it was a field in which Congress should act. So here is a re-emphasis of the point as late as this year of the Congressional inactivity issue that we raised. And I want to put that before the Court also.

We strongly urge, Your Honor, therefore, that the motion to strike should be denied, and that the Court should exercise this jurisdiction and permit discovery into the capacity and the authority of the Bank of the Philippines to bring this action on behalf of the government of the Philippines.

THE COURT: With regard to your comments on the previous ruling in the Kingdom of Kuwait — I think that's right.

MR. VON KALONOWSKI: I think that's right, Your Honor.

THE COURT: — I have reflected on it. I probably — well, it would be my ruling that I would not change that, and that I will bring — if the Philippines has standing, I will bring it within the purview of that. But I would be willing to certify it, if it would help you any.

MR. VON KALONOWSKI: I think, Your Honor, we might desire that. I think it's a point that Your Honor recognizes as an important one and should have ultimately a decision by the Supreme Court on that fact.

THE COURT: I have no objection to that, if you want it certified. I thought you had appealed from it when it was originally given a year and a half ago, but there may have been some other reasons for that.

MR. VON KALONOWSKI: Yes, we would like it certified.

THE COURT: To the extent I can incorporate that into —

MR. VON KALONOWSKI: The Philippines.

THE COURT: Yes. I don't know whether you are able to revitalize that. If we say it's a law of the case, whether you can go on at each new segment of it. But I have no objection to it. Now, the plaintiffs —

[82] MR. VON KALONOWSKI: Well, I think that we could, Your Honor. I think that when this flood case came down it strengthens our argument that we made in the earlier case and indeed in a motion here in the Philippine case.

THE COURT: Mr. Rigler.

MR. RIGLER: Your Honor, on the standing issue, I remind the Court that we were the moving party there, so obviously we are happy to have it certified. We did that to give the defendants the opportunity to raise it at the appellate level.

THE COURT: All right.

MR. RIGLER: A couple of brief comments on Mr. von Kalonowski's presentation. First of all, we stand on the cases cited in our brief. I think that they clearly point in the direction I was indicating.

Mr. von Kalonowski said that the act of state doctrine appeared to him to apply only to expropriation cases. I believe that the Bank of Spain case, Banco Espanol case, which we cited in our brief was not an expropriation case. However, a fair reading of the entire string of cases dealing with the act of state doctrine will disclose absolutely no limitation to expropriation situations. I notice Mr. von Kalonowski had to say that he depicted that from these

decisions or he thought that is what they might infer. That is not a part of the act of state doctrine.

APPENDIX B

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April 22, 1971

Honorable Miles W. Lord
Judge, United States District Court
District of Minnesota
Federal Courthouse
4th and Marquette
Minneapolis, Minnesota 55401

Re: Republic of Vietnam v. Pfizer, et al.
and State of Kuwait v. Pfizer, et al.

Dear Judge Lord:

On behalf of defendants, I would like to respond briefly to Mr. Paul Owens' letter to you of April 18 referring to the United States Government's amicus position in the Kuwait and Vietnam cases that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act.

While it may be correct that the Republic of India was a named plaintiff in several electrical equipment treble damage cases, it certainly is not clear that the issue of the Republic's own standing to sue was presented to the Court in Philadelphia in 1963 or that the judges there decided that issue. It definitely cannot be said, on the basis of the transcript and order provided by Mr. Owens or on the basis of any information we have, that "the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented" and that

denial of defendants' motions there "necessarily involved a holding" that foreign governments are "persons," as Mr. Owens argues.

Counsel for both sides in those cases, and indeed Judge Joseph Lord himself, all stated the issue as involving the standing of a government corporation organized under Indian law. (Tr. 143-45, 155, 157) Moreover, the Order of June 21, 1963 is not explicit.

On that record, defendants urge that this Court cannot find precedential support for the position of Kuwait and Vietnam. It seems to us that a decision as important as this—whether foreign governments may maintain treble damage actions—and with such far-reaching implications must be based on firmer ground. The Antitrust Division more appropriately should address its argument to the Congress. Thus we renew our request that defendants' motions to dismiss these two cases be granted for the reasons stated in our briefs and oral argument.

If the Court is not so inclined, defendants are prepared to resume argument, at the Court's convenience, on the remoteness questions presented in their motion to dismiss the Vietnam case.

Yours very respectfully,
/s/ JHM
John H. Morrison

JHM:gb

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APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

RWMcL:LB:PAO
60-21-139

April 18, 1971

Honorable Miles W. Lord
United States District Court
Minneapolis, Minnesota 55401

Re: The Republic of Viet-Nam v. Chas. Pfizer, et al (70 Civ. 877) and The State of Kuwait, et al. v. Chas. Pfizer, et al. (69 Civ. 4091) - S.D.N.Y.

Dear Judge Lord:

On March 16, 1971 the United States filed a brief as *amicus curiae* in the above captioned cases in support of the position that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act entitled to maintain treble damage actions.

During the course of my oral argument on this issue at the hearing on March 16, 1971, the question arose (Tr. pp. 205-8) as to whether the courts have ever previously ruled upon this question and, more specifically, whether in the electrical equipment cases the Government of India had been held to be a person entitled to maintain a treble damage action for damages sustained on its purchases of electrical equipment. I advised the court that I had been informed that the standing of the Government of India and certain of its instrumentalities to maintain such suits had been upheld in an unreported decision (Tr. 204-206). This

representation was challenged by Mr. Morrison who presented the oral argument on behalf of the defendants.

I have made a further inquiry into this subject and have learned that there were some nine treble damage actions filed in the Eastern District of Pennsylvania based on purchases of electrical equipment.* The plaintiffs in various of these actions were the Government of India, the Damodar Valley Corporation (a wholly owned Government corporation similar to our TVA created by act of the Indian Parliament), and certain government owned public utilities of the States of India such as the Mysore State Electricity Board, the Rajasthan Madras State Electricity Board and the Punjab State Electricity Board. The court records disclose that the Republic of India itself, as distinguished from its instrumentalities, was named plaintiff in at least five of these actions, *viz.*, Civil Actions No. 30965, 30967, 30971, 30973 and 30974.

Motions to dismiss certain of these actions were filed on the ground that the Indian Government and its various instrumentalities were not persons entitled to maintain treble damage actions. The issue was argued before Chief Judge Thomas J. Clary and Judge Joseph S. Lord, III, on June 18, 1963. I have obtained and am enclosing a copy of the transcript of the oral argument held on this issue.

I think it is clear from the transcript that the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented.

On June 21, 1963 Chief Judge Clary and Judge Lord entered an order denying the defendants' motion to dismiss

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*The reason for the fact that there were nine different cases appears to be that the complaints sought to track the several criminal indictments, each of which was directed at a price fixing conspiracy affecting different kinds of electrical equipment such as turbine generators, power capacitors, industrial control equipment, etc.

the complaints on this and other grounds. The denial of these motions to dismiss necessarily involved a holding that the Republic of India and its instrumentalities were persons within the meaning of Section 4 of the Clayton Act entitled to maintain a treble damage action. Set out below is the text of the court's order entered in Civil Actions 30965-974 as it appears in the court records.

> And now, to wit, this 21st day of June 1963, upon consideration of the various motions of defendants to strike the allegations from the complaints in the above captioned actions, to dismiss some of the complaints in the above captioned actions, and for more definite statements in some of the above captioned actions,
>
> It is hereby ordered and decreed that all of the defendants' motions to strike, to dismiss and for more definite statements directed to the above captioned complaints are hereby denied. Defendants shall have thirty (30) days from the entry of this order to answer the complaints, except that the answers to Civil Action #30974 may be deferred pending amendment by plaintiffs to allege which count or counts the purchases belong.
>
> /s/ Thomas J. Clary, C.J.
> /s/ Joseph S. Lord, III

Since the text of the statute makes it undisputably clear that foreign corporations have a right to maintain treble damage actions, I argued that it would frustrate the clearly evident Congressional intent to deny a foreign government the right to maintain an action for damages on the purely technical ground that it made its purchases directly in its own name and not through a wholly owned government corporation.

The Congressional purpose to enhance the effectiveness of the antitrust laws by authorizing private treble damage

actions to supplement federal government enforcement efforts must be given judicial effect if it is clearly discernible behind the specific manifestation in the text of the statute. This is precisely what was done in *Georgia v. Evans*, 312 U.S. 159 (1942) where the Supreme Court recognized the right of the state to maintain a treble damage action even though states were not specifically enumerated in the definition of "person" as set out in the statute.

Similarly, the Congressional purpose should be effectuated by recognizing the standing of foreign governments to maintain treble damage actions. Where the basic policy of the statute is so plain it would be a misfortune if a narrow or grudging process of construction were to confine the effect of the statute to the particular cases to which Congress adverted so as to thwart the Congressional purpose and to discriminate against injured parties whose equity is indistinguishable.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

By: /s/ Paul A. Owens
Paul A. Owens
Attorney, Department of Justice

Enclosure

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